88-1812

MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. A-782

In The
SUPREME COURT OF THE UNITED STATES

FRED R. DENNARD, JR.

Petitioner,

v.

UNITED STATES
OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

Petition for Writ of Certiorari

FRED R. DENNARD, JR.
PRO SE

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QUESTIONS PRESENTED

I.

(A) DID THE FIFTH CIRCUIT COURT OF APPEALS, HEREIN AFTER CALLED THE FIFTH CIRCUIT, DECISION IN THIS CASE [WILLIAM N. HENGST, PLAINTIFF UNITED STATES OF AMERICA, DEFENDANT-COUNTER CLAIMANT-APPELLEE VERSUS FRED R. DENNARD JR., COUNTER DEFENDANT-APPELLANT NO. 87-1841, D.C. NO. CA-A-86-174] CONFLICT WITH ITS OWN RULING UNITED STATES V MCMAHAN 569 F.2d 889 (1978) WHEN IT FAILED TO GRANT THIS PETITIONERS REQUEST FOR EN BANC CONSIDERATION, SINCE THIS CASE AS WELL AS THE ONE CITED ABOVE IS ALSO A "SUIT AT COMMON LAW" ENTITLING DENNARD A FULL TRIAL BY JURY AND ALSO IN CONFLICT WITH THE SUPREME COURT RULING IN BEACON THEATRES, INC. V WESTOVER, 359 US 500, 79 S.Ct. 948 (1959) CONCERNING THE NEED FOR A FULL JURY TRIAL RATHER THAN SOME ISSUES UNDER CONSIDERATION DETERMINED BY ONE FACT FINDER AND OTHER ISSUES BY ANOTHER FACT FINDER SUCH AS THE USE OF A PARTIALLY DIRECTED VERDICT BY THE MAGISTRATE ENCAPSULATING DENNARD AS THE "PERSON" DESCRIBED UNDER PROVISIONS OF 28 U.S.C. #6671(b) AND #6672 HEREIN AFTER CALLED I.R.S., CODE 6672. SPECIAL ISSUES ONLY WERE SUBMITTED TO THE JURY FOR CONSIDERATION AND ADDED TO THEIR CONFUSION OVER NOT HAVING A "PLAINTIFF" PRESENT FOR THE TRIAL.

II.

(a) WAS AMENDMENT FOURTEEN OF THE CONSTITUTION BREACHED WHEN PLAINTIFF HENGST WAS REMOVED FROM BEING THE PLAINTIFF PARTY AND PLACING DENNARD INTO BEING AN "INVOLUNTARY PLAINTIFF"? DID VIOLATION OF BOTH DUE PROCESS, AND EQUAL RIGHTS OCCUR TO DENNARD'S DETRIMENT? WAS THE JURY CONFUSED BY LACK OF A PLAINTIFF?

(b) WAS AMENDMENT FOURTEEN OF THE CONSTITUTION'S DUE PROCESS CLAUSE VIOLATED WHEN THE COURT SPECIFICALLY ASKED COUNCIL FOR THE UNITED STATES FOR THE STATUE OF LIMITATION FOR TAX CODE 6672 AND HOW THE TIME OR EXPIRATION DATE WAS COMPUTED AND AN INCORRECT ANSWER WAS GIVEN TO DENNARD AND THE COURT!? SEE IRS CODE SECTION 6672. '82 P.L. 97-248, SEC 334(e)(6).

(c) DID THE FIFTH CIRCUIT'S DECISION THAT THE DISTRICT COURT'S FAILURE TO DEMAND THAT DEFENDANT DENNARD BE GIVEN ADEQUATE TIME TO RESPOND TO THE UNITED STATES MOTION IN LIMINE, "COULD NOT IN ITSELF CONSTITUTE REVERSIBLE ERROR" EVEN THOUGH THE MAGISTRATE WAS VERY AWARE OF THE IMPORTANCE OF THE EVIDENCE THAT WOULD BE EXCLUDED FROM COURT RECORDS AND JURY CONSIDERATION BY SUCH A MOTION WAS THIS A VIOLATION OF DENNARD'S CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION?

(d) WAS THE FOURTEENTH AMENDMENT VIOLATED FOR DENNARD WHEN THE FIFTH CIRCUIT HAD PREVIOUSLY RULED IN THE UNITED STATES V JOHNSON, 542 F.2d 230 (1976) THAT A POINT FOR APPEAL WAS SALVAGED BY THE MAGISTRATES OWN RECOLLECTION, IN THAT OBJECTIONS, AS IN DENNARD'S TRIAL ALSO, WERE MADE IN THE MAGISTRATE'S CHAMBER WITHOUT A COURT REPORTER?

(e) WAS AMENDMENT FOURTEEN'S DUE PROCESS OF THE LAW IS VIOLATED WHEN SPECIFIC TIME NOTICES ARE IGNORED AS WHEN DENNARD WAS NOT TOLD THE UNITED STATES WOULD ASK FOR A DIRECTED VERDICT IN TIME TO PREPARE FOR TRIAL. THE SAME WITH THE SURPRISE USE BY THE UNITED STATES OF A MOTION IN LIMINE ACCORDING TO THE FEDERAL RULES OF CIVIL PROCEDURE 6(d), 7(b), 56(d), 56(g), and 60(b)?

TABLE OF CONTENTS

	PAGE NO.
QUESTIONS PRESENTED	2
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
BASIS OF FEDERAL JURISDICTION	13
REASONS FOR GRANTING THE WRIT	14

A.: THIS CASE PROVIDES THE COURT WITH AN OPPORTUNITY TO ELIMINATE CONFUSION, AS TO NEED FOR A TRIAL BY JURY, CONCERNING PROVISIONS OF 28 U.S.C. 6671(b) AND 6672. THE FIFTH CIRCUIT RULED DIFFERENTLY IN MCMAHAN V UNITED STATES 569 F2d 889 (1978) THAN IN THIS CASE WITH THE NEAR SAME CIRCUMSTANCES.

B.: THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEAL CONCERNING THIS CASE OF ISSUE IS IN VIOLATION OF THEIR OWN PREVIOUS RULINGS AND AS TO CONGRESS'S INTENTION AS TO HOW THE PROVISIONS OF 28 U.S.C. 6671(b) and 6672, SHOULD BE APPLIED. CERTAINLY NOT IN VIOLATION OF AN INDIVIDUAL'S RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION NOR SHOULD ANYONE EVER CONSTRUE SUCH PROVISIONS TO

INDICATE, OR PERMIT AN INDIVIDUAL CITIZEN TO BE PLACED IN A COURT OF LAW FINDING UNDER THESE PROVISIONS TO BE GUILTY UNTIL PROVEN INNOCENT!! SUCH CONFUSION CONCERNING AMENDMENT FOURTEEN AND I.R.S. CODES 6671(B) AND 6672 EXIST WITHIN THE CONFINES OF THIS AND OTHER SIMILAR CASES.

CONCLUSION 28

CERTIFICATE OF SERVICE 30

APPENDIX A-1

TABLE OF CITATIONS

	PAGE NO.
Beacon Theatres, Inc. v. Westover 359 U.S. 500, 79 S.Ct. 948 (1959)	15, 18, 28, A-34
Cover v. Chicago Eye Shield Co. 136 F.2d 370 (1943) 7th Circuit	24
Damsky v. Zavatt 289 F.2d 46 & 49 (1961) 2nd Circuit	15 A-29
Gefen v. United States 400 F.2d 476 (1968) 5th Circuit	15
General Motors Corp. v. California Research D.C.D. Del (1949), 9 F.R.D. 565	17
Fitzgibbon v. United States 522 F.2d 1353 (1975) 5th Circuit	15
Monday v. United States 421 F.2d 1210 (1970) 7th Circuit	15
Ross v. Bernhard 90 S.Ct. 733 (1970)	14, 28, A-32, A-36
Scott v. Neely 11 S.Ct. 712	18
Standard Oil of New Jersey v. United States 31 S.Ct. 502	17
Thermo-Stitch, Inc. v. Chem-Chord Processing 294 F.2d 486 (1961) 5th Circuit	17, A-35
United States v. Johnson 542 F.2d 230 (1976) 5th Circuit	19, 29

United States v. McMahan
569 F.2d 889 (1978) 5th Circuit 14, 18, 28

OTHER AUTHORITIES:

28 U.S.C. #6671(B) 29, A-27, A-29, A-31
28 U.S.C. #6672 29, A-3, A-9, A-29, A-31
A-12
28 U.S.C. #2254(1) 13, 1, 4
28 U.S.C. #2101(c) 1, 4
Webster's 3rd International Dictionary 8
'82 P.L. 97-248, SEC 334(e)(6) 20, A-7

F.R.C.P. RULE 68 24
F.R.C.P. RULE 19 (a)(2)(i)(ii)(b) 24, 25
F.R.C.P. RULE 20 25
F.R.C.P. RULE 23 (V)(1)(A)(B) 25
F.R.C.P. RULE 42 (b) 16
F.R.C.P. RULE 50 (a)(b)(c) 10

Fed Rules of Evidence Rule 404 (b) 19

OPINION BELOW

The opinion of the court of appeals, Fifth Circuit, appears in the Appendix as A 3 - the opinion includes a copy of the magistrate's report and recommendation.

JURISDICTIONAL STATEMENT

The Fifth Circuit Court of Appeals (herein after called the Fifth Circuit) rendered its opinion on November 17, 1988. Timely petitions for rehearing and rehearing en banc were filed; the petitions were denied January 9, 1989. The Fifth Circuit's mandate was issued on February 8, 1989. This court has jurisdiction to hear this cause pursuant to 28 U.S.C. #2254(1) and 28 U.S.C. #2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution provides:

> SECTION 1. Citizens of the United States.
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Sections 1 and 2 of the United States Constitution provides:

SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Officers during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, and Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies to which the United States shall be Party; to Controversies between two or more States; between a State and Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States Citizens or Subjects.

28 U.S.C. #2254(1) provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. #2101(c) provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court for good cause shown may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Course of Proceedings

And Disposition

In the District Court

On February 25, 1987, United States of America filed its first amended answer and counterclaim.

Ref: William N. Hengst, Plaintiff v. United States v. Fred R. Dennard, Jr. and Bob Low, Additional Defendants on Counterclaim Civil No. A-86-CA-174 (Dc, WD Texas)

As a Civil Action for the recovery of taxes assessed against plaintiff with respect to payroll taxes of Dennard-Hengst Buick, GMC, Inc. for the last quarter of 1980, and the first, second, and third quarters of 1981.

On Thursday, August 20, 1987, a pre-trial hearing was held by the Magistrate of the District Court, with trial to begin September 21, 1987. On Wednesday, September 16, 1987, United States mailed a request for a "motion in limine" and brief in support of

the United States "motion in limine" to the court and all interested parties. On Friday, September 18, 1987, a notice was mailed to all interested parties including the Court that Plaintiff William N. Hengst reached a settlement agreement wit the government pursuant to which an agreed judgement was entered into for a sum of $30,000.00, however, this mailed notice of agreed judgement has never physically been received from the court. The amount and terms of settlement were related verbally in a conversation with the Justice Department's Tax Division this same Friday, September 18, 1987.

Several telephone calls were made between the Justice Department's Tax Division and this Defendant terminating early afternoon without compromise of this cause being settled. The final comment made was an instruction to be in court early Monday, September 21, 1987.

An earlier attempt to compromise the above referenced cause was made Monday, August 13, 1987 in telephone conversation which the Justice Department's Tax Division requested a Collection Information Statement as well as a Health Statement on this Defendant. It became very evident that any agreed settlement judgement acceptable to the Justice Department's Tax Division would be a great financial hardship on this Appellant.

The trial of this matter came on to be heard Monday the 21st of September at 1:30 p.m. All parties were duly served notice of the setting.

Additional Defendant on counterclaim, Bob Low, failed to appear for trial as summoned and was, therefore, in default, and indebted to the United States in the sum of $96,655.22 together with statutory additions and increases as provided by law, reduced by such credits for payment as are authorized by law. October 1, 1987, United States District

Court entered it's order for default judgement.

Clerk of the Court notified Defendant Fred R. Dennard, Jr. of the United States "motion in limine" request and magistrates decision of acceptance only moments prior to trial. Defendant Fred R. Dennard, Jr. requested, and was granted, an opportunity to object to this motion to the court. Objection was over ruled concerning the United States "motion in limine". On the 21st day of September, 1987 came on to be heard the above - styled and numbered cause. A jury having been previously demanded, the case proceeded to trial. The Court granted a partial directed verdict in favor of the United States of America finding, as a "matter-of-law", not as a "matter of common law", i.e., a "matter of law" defined by Webster's Third New International Dictionary as "a legal matter involving primarily a question of law according to the rules of law

must be answered by the Court in accordance with principals of law - - -". Fred R. Dennard, Jr. was a "person" responsible for the payment of federal taxes withheld from the wages and salaries of employees of Dennard-Hengst Buick-GMC, Inc.

At the conclusion of the evidence, the Court submitted only the remainder of the case to the jury on special issues. The charge of the Court and verdict of the jury are incorporated herein for all purposes by reference. The verdict of the jury on the special issues was duly received by the Court. It appearing that the verdict of the jury was for the United States of America as to the first, second and third quarter of 1981, and for Fred R. Dennard, Jr. as to the fourth quarter of 1980.

Thursday, November 12, 1987, Additional Defendant Fred R. Dennard, Jr. filed a Motion to Alter or Amend Judgment that was field Wednesday, November 4, 1987,

in the United States District Court, Western District, Austin Division.

MOTION TO ALTER OR AMEND JUDGEMENT

Fred R. Dennard, Jr. additional Defendant on the counterclaim requests that the judgement entered on November 4, 1987 be reformed and replaced with a judgement not withstanding the verdict of the jury because:

1. The jury's charge was confusing to them.
2. The jury gave inconsistent answers to the charges.
3. Justice was not served.

This motion is respectfully submitted in accordance with Rule 59 of the United States Federal Rules of Civil Procedure.

IT IS, ORDERED that Additional Defendant Fred R. Dennard, Jr.'s Motion to Alter or Amend Judgement be and is hereby DENIED.

SIGNED this 4th day of December, 1987.

Rule 50(b) FRCP states that a Motion

for Directed Verdict shall state specific grounds for granting or denying a new trial. The District Court failed to provide this option, there by denying Dennard's Motion to Alter or Amend Judgement.

Petitioner Dennard next filed an appeal before the Fifth Circuit Court of Appeals No. 87-1841.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgement of the District Court in this cause is affirmed and the cause is remanded to the District Court for modification in accordance with the opinion of this Court.

Petitioner Dennard filed a request in the Fifth Circuit United States Court of Appeals as a Suggestion for Rehearing En Banc.

Defendant Dennard then filed a Motion for Appeal with the Fifth Circuit Court of Appeals. The Fifth Circuit reached a conclusion on November 17, 1988 that the

judgement appealed from "is affirmed and remanded for modification". Counter Defendant Appellant Dennard filed a petition with the Fifth Circuit Court of Appeals as a Suggestion for Rehearing En Banc and panel rehearing which was denied January 9, 1989.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in this court of first instance was a petition for appeal to the Fifth Circuit No. 87-1841 from judgement in the United States District Court, Austin, Texas, Civil No. A-86-CA-174 filed pursuant to 28 U.S.C. #2254.

REASONS FOR GRANTING THE WRIT

A.

The Supreme Court's decision in Ross v. Bernhard 90 S.Ct. 733 (1970) involved an individual's right to a trial by jury of a fact issue in an action which the appellant contended was a "suit at common law" within the intendment of the Seventh Amendment the Fifth Circuit, with the above Supreme court ruling decided in United States v. McMahan 569 F.2d 889 (1978) that en banc consideration was indeed appropriate.

There can be no question as to the similarity of the proceedings against Dennard as compared to those against McMahan brought by the United States in both cases seeking collection of the 100% penalty from finding them as responsible persons who wilfully failed to pay over the tax of their principal and as such is a "suit at common law", according to the Fifth Circuit's interpretation of Ross v. Bernhard 90 S.Ct.

733 (1970).

The magistrate of the district court made the decision that the suit brought before him was a matter of a purely legal claim "as a matter of law", rather than as "a matter of common law" consequently ruling in the United States favor with the use of a partially directed verdict. Fitzgibbon v. United States, 522 F.2d 1353 (Fifth Circuit, 1975), Damsey v. Zavatt, 289 F.2d, 46 & 49 (Second Circuit 1961). Monday v. United States, 421 F.2 46 & 49 (Second Circuit, 1961). Monday v. United States, 421 F.2d 1210 (Seventh Circuit, 1970) Gefen v. United States, 400 F.2d 476 (Fifth Circuit, 1968), 89 S.Ct 990 (1969), ordinarily litigant's in suits concerned solely with liability for federal taxes are entitled to a jury trial, where no equitable issues are raised. The Supreme Court ruled in Beacon Theatres, Inc. vs. Westover 79 S.Ct. 948 (1959) "the right of the party demanding a jury trial [must be]

at least coordinate with that of the party seeking trial to a court." 289 F.2d 56 (1959). The use of discretion by the trial court under Rule 42(b) to deprive Beacon of a full jury trial on its counterclaim and cross claim. As well as on Fox's plea for declaratory relief, cannot be justified. Under the federal rules the same court may try both legal and equitable causes in the same action. Fed. Rules Civil Proc., 1, 2, 18, - - - - whatever permanent relief Fox was entitled to on the basis of the decision in this case could be given by the court after the jury renders its verdict. In this way the issues between these parties could be settled by one suit giving Beacon a full jury trial of every antitrust action. By contrast, the holding of the court below while granting Fox no additional protection unless the avoidance of jury trial be considered as such, would have compelled Beacon to split his antitrust case, trying

part to a judge and part to a jury as done in District Court to Dennard. [Standard Oil Co. of New Jersey v. United States 31 S.Ct. 502"- - - it is particularly undesirable to have some of the relevant considerations tried by one fact finder and some by another".] Such a result, which involves the postponement and subordination of Fox's own claim for declaratory relief as well as of the counterclaim which Beacon was compelled by the federal rules to bring is not permissible. Federal Rules of Civ. Proc., 13(a). In Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp. 294 F.2d 486 (1961) on occasion, attempts to apply the "basic nature" test have led to inconsistent results. [General Motors Corp. v. California Research Corp. D.C.D. Del (1949), 9 F.R.D. 565. Beacon Theatres eliminates this test to determine order of trial under Rule 42(b). The Supreme Court held that the district judge abused his discretion in ordering trial

of the equitable claim first as in Dennard's case, and ordered that the case be submitted to the jury. The Supreme Court said in Scott v. Neely 11 S.Ct. 712 "In federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of legal action, or during its pendency." The judgement of the Court of Appeals is reversed Beacon Theatres, Inc. v. Westover 79 S.Ct. 948 the judgement of the Fifth Circuit Court of Appeals in United States v. McMahan 569 F.2d 889 (1978) that the trial court will provide for a jury trial of that part of the complaint that charges Mr. McMahan's liability for violating the quoted section of the code 6672.

B.

Had the Magistrate insisted that proper time be given to Defendant Dennard to

respond to the United States "motion in limine" trial preparation on Dennard's part would have been very different. Dennard would have had the opportunity to object in open court properly and at that time additional evidence could have been presented as well as obtaining knowledgeable witnesses. Please review a case in point where the Fifth Circuit did accept the fact that all objections were made in the Magistrate's chambers without a court reporter; the Magistrate thoughtfully noted this occurrence so the point could be preserved in the event of appeal to a higher court Rule 404(b) Fed. R. Evid. United States v. Johnson (5th Cir) 542 F.2d 230 (1976) failure to provide for time of notice prior to trial is in violation of the Fourteenth Amendment of the Constitution's due process-provision as well as depriving Dennard equal protection of the laws. Use of a partially directed verdict is deny Dennard a full trial by jury as a

surprise motion by the United States without specific time notices as required by the Federal Rules of Civil Procedures is perhaps also in violation of the due process provision as well as depriving Dennard of equal protection of the laws. In open court Defendant Dennard asked council for the United States for the period of time the statute of limitation would have till expiration. Council for the United States gave the court an incorrect answer such as three years after notice of assessment for a court ruling. One of the correct answers should have been in '82, P.L. 97-248, Sec. 334(e)(6) provides: (6) Waiver of Penalty-no penalty shall be assessed under Section 6672 with respect to any failure to withhold as required by the amendments made by this section [Code Section 3405] if such failure was before July 1, 1983, and if the "person" made a good faith effort to comply with such withholding requirements, this case pertains

to years 1980 and 1981. Surely errors permitted by the court, violation of an individual's rights of the due process provision, and equal protection under the law provision of the Fourteenth Amendment of the Constitution will cause this Supreme Court to request a retrial or dismissal, finding the judgement at issue invalid. The Congress of the United States while attempting to provide the Internal Revenue Service adequate law support for the collection of taxes mis-defined and mis-directed the wording of the Adopted Code of 6672 in which an individual is guilty of failure to collect and pay over payroll and withholding tax to the Internal Revenue Service even if that individual had no knowledge that said tax was due and unpaid and consequently is assessed a 100% penalty. With dire threats of impending foul consequences, that individual already found (guilty) responsible for an unknown act is forced into tax court or District Court to

try, if he or she has adequate financial resources or is a legal pauper to prove his innocents. An individual who has resources between these financial extremes will have serious problems finding affordable legal assistance, and may, as in this case instance, out of desperation, will attempt to obtain legal equity and defend themselves poorly as a pro se petitioner, "Guilty until proven innocent" is not this great country's form of justice. Surely such actions against an individual, randomly selected and placed as the "person" under I.R.S. Code 6672 in financial Jeopardy is a serious breach of constitutional rights within the intendments of this Fourteenth Amendment.

The Lower Court possibly erred when the magistrate permitted the United States to accept an agreed judgment in their favor against Plaintiff William N. Hengst for an amount of $30,000.00. Additional Defendant Dennard was verbally offered an identical

opportunity to accept an agreed judgment by counsel of the Justice Department on Friday afternoon, September 18, 1987 with the trial set for the following Monday. Defendant Dennard was told by attorneys for the Justice Department that the terms must be identical to the agreed judgement to be filed against Plaintiff Hengst. When Defendant Dennard refused to accept those terms of settlement, immediately on the telephone, the counsel for the Justice Department began to explain all of the dire consequences that could be expected, as collection efforts by the Internal Revenue Service as a threat to end any kind of expectation of a continued pleasant life style. This Defendant refused on such short notice to consider the acceptance of an agreed judgement with final remarks form the Justice Department attorney that it would be wise to appear in court early Monday morning for selection of the jury. This offer to confess or accept

judgement was not secured but one day before trial, Cover v. Chicago Eye Shield Co. (7th Circuit) 136 F.2d 370 (1943) No. 8220, Federal Rules of Civil Procedure Rule 68, since acceptance of Plaintiff William N. Hengst of judgement in favor of the United States placed Defendant Dennard in the position of being an "Involuntary Plaintiff" Rule 19 Federal Rules of Civil Procedure (a)(2)(i)(ii) and in addition according Federal Rules of Civil Procedure 19(a) that the absence of Plaintiff Hengst, complete relief can not be accorded among those already parties. Federal Rules of Civil Procedure 19 The Amended Rule (a) provides a definition of individuals to be joined or their description is a tortfeasor when such action of joinder fails to occur with the usual "joint and several" liability is merely a permissive party to an action against another with like liability and such regulated by Federal Rules of Civil Procedure

20, under subdivision (b) Federal Rules of Civil Procedure 19 "when a person as described in subdivision (a)(1)-(2) can not be made a party, the one indispensable, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed because of the possible collateral consequences of the judgement upon the parties already joined. The third factor F.R.C.P. 19(b) calls attention to the use of the word "indispensable" and a party is regarded as such when he can not be made a party and, upon consideration of the factors mentioned it is determined that in his absence it would be preferable to dismiss the action, rather to retain it. Reference here is made to the absence of Plaintiff Hengst and Additional Defendant Low on the above referenced counterclaim. Federal Rules of Civil Procedure 23 concerning class action embodies points of law valid also for

counterclaim except for numbers of persons so numerous that joinder is impractical but there are factors of law or fact in common (v)(1)(A)(B) "the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members ---, or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests". The acceptance of an agreed judgement by Plaintiff Hengst in favor of the United States and Additional Defendant Bob Low's acceptance of judgement by default placed Defendant Dennard in an inequitable, and unequal position of judgement liability entered by the Lower Court for $117,355.96 versus Plaintiff Hengst's judgement liability of $30,000.00

from an identical charge by the United States Internal Revenue Service for assessment of a 100% penalty under I.R.S. Code 6672. As such as described above Defendant Dennard believes his "rights of due process" under Constitutional Amendment 14 were violated.

Conclusion

I.

(A) The decision of the Fifth Circuit in this case misapplies its own ruling in United States v. McMahan and conflicts with this, the Supreme Court's ruling in Beacon Theatres, Inc. v. Westover and Ross v. Bernard 90 S.Ct. 733 (1970) and conflicts with other circuits on the same issue of law with a jury trial of only special issues.

II.

The following sub-sections were violations of Dennard's rights under the Fourteenth Amendment.

(a) A trial without a plaintiff.

(b) A trial where the statute of limitation had run out.

(c) A trial where specific time notice was waved by the Court concerning time that this Plaintiff would require to adequately respond to this motion according to the Federal Rules of Civil Procedure.

(d) The Magistrate erred by not informing Dennard that the court reporter should be present to preserve the Plaintiff's objection to the "motion in limine" made in the court's chamber should this point need be preserved for appeal. United States v. Johnson 542 F.2d 230(e) notice should have been given Dennard concerning trial preparation with the Court's use of a partially directed verdict, according to the Federal Rules Civil Procedure.

Surely, this could not be what Congress intended under Section #6671 and #6672 of the Internal Revenue Code. Therefore, Petitioner urges this court to grant certiorari review and reverse the ruling of the Fifth Circuit.

Respectfully submitted,

Fred R. Dennard, Jr.
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CERTIFICATE OF SERVICE

I Fred R. Dennard, Jr. Petitioner Pro Se, hereby certify that on the 4th day of May, 1989 I served three copies of the petition for Writ of Certiorari: Mr. Gary R. Allen, P.O. Box 502, Tax Division Dept. of Justice, Washington D.C. 20044 and Gilbert F. Ganucheau, United States Court of Appeals, For the Fifth Circuit, 600 Camp St., Room 100, New Orleans, La. 70130 by a duly addressed envelop with postage prepaid.

Fred R. Dennard, Jr.
Petitioner, Pro Se

No. A-782

IN THE SUPREME COURT OF THE UNITED STATES

FRED R. DENNARD, JR.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A P P E N D I X

SUPREME COURT OF THE UNITED STATES

No. A-782

Frank R. Dennard, Jr.

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of the Petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 9, 1989.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 29th

day of March, 1989.

Sec. 6671

Rules for application of assessable penalties.

(a) Penalty assessed as tax.

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.

The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Is '76, P.L. 94-455, Sec. 1906(b)(13)(A), substituted "Secretary or his delegate" in subsec. (a) effective 2/1/77.

Sec. 6672.

Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made

against any person, such person -

(A) pay an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Suit must be brought to determine liability for penalty. If, within 30 days after the day on which his claim for refund

with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the court of Claims) for the determination of his liability of such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond. The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may be regulations prescribe and shall be in an amount equal to 1-1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitation on collection. The running of the period of limitations provided in section 6502 on the collection by levy or

by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection. If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

In '82, P.L. 97-248, Sec. 334(e)(6) provides:

(6) Waiver of penalty. - No penalty shall be assessed under section 6672 with respect to any failure to withhold as required by the amendments made by this section [Code Sec. 3405] if such failure was before July 1, 1983, and if the person made a good faith effort to comply with such withholding requirements."

In '78, P.L. 95-628, Sec. 9(a), added "(a) General rule." before "Any person" and added subsec. (b), for penalties assessed more than 60 days after 11/10/78.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1841
Summary Calendar

A86CA174

WILLIAM N. HENGST,	Plaintiff,
versus	
UNITED STATES OF AMERICA,	Defendant-Counter Claimant-Appellee,
versus	
FRED R. DENNARD, JR.,	Counter Defendant-Appellant,

Appeal from the United States District Court
For the Western District of Texas
(CA-A-86-174)

(November 17, 1988)

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges. PER CURIAM:*

Following a jury verdict and a partial directed verdict, the lower court entered judgement against Fred R. Dennard, Jr., pursuant to 28 U.S.C. # 6672, in the amount of $87,355.96 for failing to pay over to the United States income taxes withheld from his employees. Dennard appeals. We affirm.

In 1989, Dennard and William Hengst formed a corporation to operate a Buick-GMC automobile dealership in Orange, Texas. Dennard was the president and 51% owner. William Hengst owned the remaining 49% of the corporate dealership. After the dealership began to expand, Dennard and Hengst realized-

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* Local Rule 47.5 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

they needed assistance and decided to hire an experienced comptroller to provide necessary accounting and other office procedures. Bob Low was hired for the position. His duties included the withholding and paying of the income and social security taxes for the dealership's employees.

In the fall of 1980, Dennard and Hengst hired an accounting firm to review the dealership's financial records and internal control procedures. The firm discovered that the dealership's bank, operating, payroll, and depository accounts had not been reconciled for months. Dennard and Hengst were also informed that the dealership was incurring 5% penalties from the IRS because Low was not depositing federal employment and social security taxes in a timely manner.

By the summer of 1981, the dealership was bankrupt and owed the federal government $96,655.52 in payroll withholding taxes due from the last quarter of 1980 through the

third quarter of 1981. The taxes had been withheld from employee wages, but had not been paid over to the IRS. Penalties were assessed and suit brought by the IRS against Dennard, Hengst, and Low. The full $96,655.22 was assessed against each, although the government sought to collect only once. Hengst settled with the government and paid $30,000.00. Low defaulted, and judgement was entered against him for the full $96,655.22. The government's action against Dennard went to trial, and following a partial directed verdict and a jury verdict, the court entered judgement against Dennard for $87,355.96--the amount of taxes owed for the first three quarters of 1981. The jury concluded that the failure to deposit the 1980 taxes had not been wilful on Dennard's part.

All employers are required to withhold federal income and social security taxes from their employee's wages and to deposit those

funds with the government within three banking days of the date the wages were paid. 26 U.S.C. #3102, 3402. The withheld taxes are then held in trust for the benefit of the federal government and the employee. Newsome v. United States, 432 F.2d 742, 745 (5th Cir. 1970). If an employer withholds taxes but does not deposit them, the government's only recourse is against the employer. The employee is protected. Id. at 744.

To protect against losses caused by employers who do not pay over withheld taxes, the tax code authorizes the IRS to proceed against the person responsible for collecting and paying over the taxes. 28 U.S.C. #6672. The government may proceed against all such responsible persons. See Brown v. United States, 591 F.2d 1136, 1142 (5th Cir. 1979). To establish liability under the tax code, the government must prove that (1) a person responsible for paying over the taxes, (2) wilfully failed to do so. Dennard challenges

each element and the amount of the judgement against him.

Responsibility for paying over taxes withheld is a matter of status and authority. Mazo v. United States, 591 F.2d 1151, 1153 (5th Cir.), cert. denied, 444 U.S. 842 (1979). The statutory responsibility imposed by virtue of authority is not affected by delegation. Id. Hiring Low did not remove Dennard's responsibility. Dennard was the chief officer of the dealership and its majority owner. He, more than any other person, was a responsible person under the tax code. See id.; Neckles v. United States, 579 F.2d 938, 940 (5th Cir. 1978). Noting these undisputed facts, the district court properly granted a partial directed verdict on this point.

Dennard argues, however, that after the dealership was placed into bankruptcy, the bankruptcy trustee became responsible in his stead for paying the taxes. Although the

dealership was given notice of this tax deficiency when bankruptcy proceedings were commenced, liability for failure to pay over the taxes had arisen, under the statute, immediately after taxes were withheld from employee wages. See Barnett v. United States, 594 F.2d 663, 215 Ct.Cl. 148 (1977). Furthermore, Dennard's liability as one of the responsible persons is personal and is not affected by the corporation's bankruptcy. United States v. Huckabee Auto Co. 783 F.2d 1546, 1548 (11th Cir. 1986) (relying on fifth circuit precedent in its analysis).

Wilfully, for the purposes of section 6672, means "a voluntary, conscious and intentional failure to collect, truthfully account for, and pay over the taxes withheld from employees." Newsome, 431 F.2d a 745. A responsible person acts wilfully within the meaning of the section by permitting the business' funds to be paid to other creditors knowing that the withheld taxes have not been

paid over to the government. Id. at 745-46; Mazo, 591 F.2d at 1177. Acting with reckless disregard for the known risk that withheld taxes have not been paid over also satisfies the requirements of section 6672. Bowen v. United States, 836 F.2d 965, 968 (5th Cir. 1988). Applying this standard to the evidence, the jury found that Dennard had wilfully failed to pay over the taxes. Because there is ample evidence to support the jury's verdict, Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969) (en banc), concludes this matter. The report of the accounting firm that reviewed the dealership's financial records, alone, evidences that Dennard knew that taxes were not being paid on time. As noted above, Dennard could not, by delegating the actual payment of the taxes to Low, avoid his responsibility. There were clear warning signs. The accounting firm's report made continued unchecked reliance upon Low a

reckless disregard of a statutory duty. Dennard asserts that the district court's order in limine that related to evidence on this pint was erroneous because the court failed to provide him time to respond to the government's motion. Such a ruling on a motion in limine, however, cannot constitute reversible error in itself. The complaining party must also object to the resulting proof at trial. See Collins v. United States, 621 F.2d 777, 784 (5th Cir. 1980). Dennard failed to preserve any error that may be present.

Finally, Dennard argues that the government waived its right to a judgment greater than $30,000.00 by settling its claim against Hengst for that amount. Each responsible person's liability, however, is severable and distinct. Brown, 591 F.2d at 1142. Dennard's argument is without merit.

The government concedes that the District Court's judgement contains a

typographical error. The judgement incorrectly states that the United States should recover $75,226.81 from taxpayer for the first quarter of 1981. The correct amount should be $45,226.81 for that quarter. The cause is remanded to the District Court with instructions to modify the judgement to reflect the correct amount.

The judgement appealed from is

AFFIRMED and REMANDED
for Modification.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1841

WILLIAM N. HENGST,	Plaintiff,
versus	
UNITED STATES OF AMERICA,	Defendant-Counter Claimant Appellee,
versus	
FRED R. DENNARD, JR.	Counter Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

ON SUGGESTIONS FOR HEARING EN BANC

(Opinion November 11, 5 Cir.,1988, __F.2d__)

(January 9, 1989)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge

in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having noted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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CHIEF JUDGE

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 87-1841

D.C. Docket No. CA-A-86-174

WILLIAM N. HENGST,

Plaintiff,

versus

UNITED STATES OF AMERICA,

Defendant
Counter Claimant-
Appellee,

versus

FRED R. DENNARD, JR.,

Counter Defendant-
Appellant.

Appeal from the United States District Court
For the Western District of Texas

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

J U D G E M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgement of the District Court in this cause is affirmed and the cause is remanded to the District Court for modification in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that counter defendant-appellant pay to defendant-counter claimant-appellee the costs of appeal, to be taxed by the Clerk of this Court.

November 17, 1988

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

WILLIAM N. HENGST
Plaintiff,

VS. CIVIL NO. A-86-CA-174

UNITED STATES OF AMERICA
Defendant

VS.

FRED R. DENNARD, JR. and
BOB LOW,
Additional Defendants
on Counterclaim.

J U D G E M E N T

On the 21st day of September, 1987, came on to be heard the above-styled and numbered cause, with Fred R.Dennard, Jr. and the United States of America announcing ready for trial. A jury having been previously demanded, a jury consisting of six good and lawful jurors was duly impaneled, and the case proceeded to trial.

At the conclusion of Fred R. Dennard, Jr.'s case-in-chief, the Court granted a partial directed verdict in favor of the United States of America finding, as a matter-of-law, Fred R. Dennard, Jr. was a person responsible for the payment of federal taxes withheld from the wages and salaries of employees of Dennard-Hengst Buick-GMC, Inc.

At the conclusion of the evidence, the Court submitted the remainder of the case to the jury on special issues. The charge of the Court and verdict of the jury are incorporated herein for all purposes by reference. The verdict of the jury was duly received by the court. It appearing that the verdict of the jury was for the United States of America as to the first, second and third quarter of 1981, and for Fred R. Dennard, Jr. as to the fourth quarter of 1980.

IT IS ORDERED, ADJUDGED AND DECREED that the United States of America recover from Fred R. Dennard, Jr. the amounts of

$75,226.81 for the first quarter of 1981, $41,856.54 for the second quarter of 1981, and $272.61 for the third quarter of 1981, plus statutory additions and increases provided by law from the date of assessment, reduced by credits for payment as are authorized by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America recover nothing against Fred R. Dennard, Jr. for taxes withheld during the fourth quarter of 1980.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs incurred herein be taxed against Fred R. Dennard, Jr., for which let execution issue.

SIGNED this 23rd day of October, 1987

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

Henry L. McMahan et al.,

Defendants-Appellants.

No. 75-3915

United States Court of Appeals,

Fifth Circuit.

March 17, 1978.

Government brought suit against officer of corporation, alleging that officer had failed to pay over withholding taxes and seeking to set aside conveyances by officer and to foreclose Government's lien against property formerly owned by officer and subsequently conveyed to others. The United States District Court for the Northern District of Georgia, 392 F.Supp. 1159, Richard C Freeman, Jr., entered judgment in favor of Government, and officer appealed. The Court of Appeals, 556 F.2d 362, affirmed,

and petition for reconsideration en banc was granted. The Court of Appeals, Tuttle, Senior Circuit Judge, held that officer of corporation was entitled to jury trial of that part of complaint charging officer with liability for violating statutes government penalties for failing to collect and pay over tax.

Reversed.

1. Federal Civil Procedure 2081

Proceedings brought by United States seeking collection of 100% penalty from officer of corporation as a responsible person who willfully failed to pay over tax of his principal was **a "suit at common law"** within intendment of Seventh Amendment. U.S.C.A. Const. Amend. 7.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure 2081

In action brought against officer of corporation in which Government sought

collection of 100% penalty from officer as responsible person who willfully failed to pay over taxes of his principal, officer of corporation was entitled to jury trial of that part of complaint charging officer with liability for violating statutes governing penalties for failure to collect and pay over tax, even though Government, in same action against officer, also sought equitable relief against him, his wife, and others to

1. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. Const. Amend. VII.

2. #6671. Rules for application of assessable penalties.

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* Judge Thornberry did not participate in the consideration of or decision in this case.

(b) Person defined. - The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to preset aside conveyances and foreclose Government's lien against property formerly owned by officer and subsequently conveyed by him to others. U.S.C.A. Const. Amend. 7; 26 U.S.C.A. (I.R.C. 1954 #6671(b), 6672.

Fred L. Somers, Jr., John W. Gibson, Atlanta, Ga., for defendants-appellants.

William L. Harper, U. S. Atty., Wm. D. Mallard, Jr., Asst. U. S. Atty., Atlanta, Ga., Scott P. Crampton, Asst. Atty. Gen., Crombie J. D. Garrett, William S. Estabroo, Ill. Tax Div., Gilbert Andrews, Act. Chief App. Sec., U. S. Dept. of Justice, WAshington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, C. J., and TUTTLE. Senior Circuit Judge, and COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE. Circuit Judges.*

TUTTLE, Senior Circuit Judge:

The court has taken this case for en banc reconsideration of a single issue concerning the right to a jury trial under the Seventh Amendment to the United States Constitution.[1] More precisely, the issue is whether the defendant in an action by the United States to enforce the provisions of 26 U.S.C. #6711(b) and 6672[2] has the right to

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[1,2] There can be no question that the proceedings brought by the United States in this case seeking collection of the 100% penalty from McMahan as a responsible person who wilfully failed to pay over the tax of his principal is such a suit at common law. The United States in its brief relies upon the opinion of the Court of Appeals for the Second Circuit in Damsky v. Zavatt, supra,

for the proposition that McMahan is not entitled to a jury trial. Nevertheless, the United States correctly points out that, in Damsky, the court held that a jury trial was required as to those claims against Damsky alone. It held only that, where the claim against Damsky was combined with a claim to set aside a fraudulent conveyance of real estate, the equitable nature of the relief sought over-balanced the legal claim to such an extent that equity would prevail and the right to a jury trial would be swallowed up in the equitable proceedings. As to the proposition that the suit before us contains a purely legal claim, as distinguished from the equitable claim, the government concedes in footnote 4 of its original brief:

> As the McMahans note (citing Fitzgibbon v. United States, 522 F.2d 1353 (C.A.5, 1975), and as the District Court found (citing Damsky v. Zavatt, 289 F.2d 46, 49 (C.A.2, 1961), Monday v. United States, 421 F.2d 1210 (C.A.7, 1970) and Gefen v. United States, 400 F.2d 476 (C.A.5, 1968), cert. denied, 393 U.S. 1119 [89 S.Ct. 990, 22 L.Ed.2d 123] (1969), ordinarily litigants in suits concerned solely with liability for federal taxes are entitled to a jury trial, where no equitable issues are raised.

demand the convening of a jury to determine whether he is a "person" as defined in form the act in respect of which the violation occurs.

#6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

Section 6671(b) and, if so, whether he violated the provisions of section 6672 even when the government in the same action also

seeks equitable relief against him, his wife, and others to set aside conveyances and to foreclose its lien against property formerly owned by him and subsequently conveyed to others. See United States v. McMahan, 556 F.2d 362 (5th Cir. 1977).

The panel which previously heard this case was bound by the earlier case of Gefen v. United States, 400 F.2d 476 (5th Cir. 1965), which held that a jury trial was not required in an action in all respects similar to the one before us. Gefen, in turn, was decided on the basis of Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961). In announcing our earlier decision in this case, we said that the principle established in Damsky and Gefen "must subsist unless set aside by an en banc rehearing or by intervening Supreme Court decisions." 556 F.2d at 365. In light of the Supreme Court's decision in Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), which postdated Damsky

and Gefen, and since this case involves the right to a jury trial of a fact issue in an action which the appellant contends is a "suit at common law" within the intendment of the Seventh Amendment, the court determined that en banc consideration was indeed appropriate.

The United States, quoting in part from the Damsky case, supra, also states:

> The suit to establish a personal judgment against Bernard [Damsky] was similar to a suit at common law for debt for the collection of taxes, and, thus, was a suit at common law within the Seventh Amendment of the Constitution of the United States even though "as said in Bull v. United States, 1935, 295 U.S. 247, 260, 55 S.Ct. 695, 700, 79 L.Ed. 1421, an assessment of taxes "has the force of a judgement," since "actions on judgments likewise were in debt or, in some instances, contract." Damsky v. Zavatt, 289 F.2d at 52. [emphasis added]

The real basis for the decision in Damsky on the count for a personal judgment against Damsky on his joint liability with his wife, against whom the claim was only in equity, was its reading of Beacon Theatres,

Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959), as holding that "the right of the party demanding a jury trial [must be] at least coordinate with that of the party seeking trial to a court." 289 F.2d at 56. It is now clear that this is not what the Supreme Court held in Beacon. Subsequent to the Damsky decision, the Court decided Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). There the Court said:

> The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, "bold under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not.

Id. at 472-473, 82 S.Ct. at 897, quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) (footnotes omitted). The Court quoted

with approval from an opinion by this court in Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961):

> It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it.

369 U.S. at 473 n.8, **82 S.Ct. at 897**, quoting 294 F.2d at 491.

It seems quite clear that, if the Dairy Queen analysis of the earlier Beacon Theatres case had been available, the Court of Appeals for the Second Circuit would not have concluded in Damsky that the equitable nature of the foreclosure of the government's lien in that case swallowed up the party's right to a jury on the issue of liability for the penalty. Similarly, this court in the Gefen case would not have considered Damsky

as denying the party his right to a jury trial in such an action.

"A more careful rereading of the case of Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed. 2d 729 (1970), also, it seems to us, frees us, from what in Gefen we called the "validated historical bondage" of Damsky. 400 F.2d at 479." In the panel opinion in this case, we noted that in Ross v. Bernhard, a derivative action by a stockholder, the cause of action which formed the basis of the suit by the corporation against the defaulting officials would determine the shareholder's entitlement to a jury trial of his corporation's causes. The panel's discussion of Ross v. Bernhard treated the corporation's claim as being legal in nature. Careful analysis, however, shows that the corporation's claims themselves were both legal and equitable. The Supreme Court held that, since the corporation's claim was, at least in part, a legal one, it "would have

been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence." 396 U.S. at 542, 90 S.Ct. at 740 "Under these circumstances," the Court said, "it is unnecessary to decide whether the corporation's other claims ar also properly triable to a jury." Id. at 542-43, 90 S.Ct. at 740.

Upon remand the trial court will provide for a jury trial of that part of the complaint that charges Mr. McMahan's liability for violating the quoted section of the code.

The judgment is REVERSED for further proceedings not inconsistent with this opinion.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Leonard Edward JOHNSON,

Defendant-Appellant,

No. 76-2105

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

November 5, 1976.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana at New Orleans, Alvin B. Rubin, J., of violation of a federal statute by pointing a pistol at FBI agents in an effort to escape them. Defendant appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that an accused is not justified in threatening deadly force to oppose federal officers merely because it later turns out that the officers lacked reasonable suspicion for their stopping of

accused's vehicle. Where evidence concerning defendant's prior conviction an existence of an arrest warrant directly contradicted a position defendant had taken on the stand, such evidence was admissible notwithstanding the rule which creates in effect a rebuttable presumption that convictions over ten years old are more prejudicial than helpful and should be excluded.

Affirmed.

Proper method of preserving point for appeal would have been for defendant to bring before Court of Appeals his original objection to admission of the testimony, Government's response attempting to bring

III. Other Crimes Testimony.

[4] Appellant Johnson took the stand in his own behalf and, during the course of cross-examination, the government's counsel elicited testimony from Johnson regarding his criminal record and an outstanding warrant

for his arrest. Johnson asserts that it was reversible error for the district court to allow this line of questioning.[8]

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[8] Appellant's manner of preserving the point for appeal was irregular. No objection was ever made on the record. Instead, the objection was made and overruled in chambers with the court reporter absent. Later, the trial judge put into the record his recollection of the objection and his reason for overruling it.

Because appellant failed in his obligation to make the record for appeal, he came dangerously close to losing this chance to argue to us his evidentiary point. Had appellant gone by the book, we would have had before us four items: (1) the original objection, (2) the government's response attempting to bring the elicited testimony within one or more of the exceptions to the bar against "other crimes" evidence, (3) the appellant's response to the government's position, and (4) the trial judge's ruling based on the arguments of both sides.

Here we have only a general objection as restated by the trial judge and his decision to overrule based on the impeachment exception to the general rule of exclusion.

If it is necessary to hear an objection outside the presence of the jury, this can be done without depriving this court of a record upon which to base its holdings.

[5, 6] The Federal Rules of Evidence allow evidence of other crimes to prove motive. In its brief the government argues that the felony conviction and the existence of the arrest warrant were necessary to show Johnson's motive for resisting the officers, the theory being that, under the circumstances, Johnson could not afford to be caught with a gun in his possession. This is an acceptable use of such evidence. See United States v. Parten, 462 F.2d 430 (5th Cir. 1972).

[7] The district court apparently took the position that the evidence was admissible to impeach the testimony of Johnson. We think the district court's ruling was correct.

THERMO-STITCH, INC., Appellant,

v.

CHEMI-CORD PROCESSING CORP. and

Standwear Pleating Co., Inc.

Appellee.

No. 18442.

United States Court of Appeals

Fifth Circuit.

September 15, 1961.

Action in which the defendant appealed from an order of the United States District Court for the Southern District of Florida, Emett C. Choate, J., which granted an immediate and separate trial on issues of validity and infringement of patent and struck defendant's motion for the trial by jury on those issues. The Court of Appeals, Wisdom, Circuit Judge, held that where manufacturer and customers sued to restrain patent holder from interfering with manufacturer's business relations and from

harassing it by threats of suit, and for a declaratory judgment that its three patents were invalid and not infringed, and the patent holder counterclaimed for patent infringement, fraud and anti-trust violations, and demanded a jury trial upon issues of fact raised by counterclaim, the trial court abused its discretion in not ordering a jury trial.

Order appealed from set aside and case remained with directions.

The Seventh Amendment to the United States Constitution, 28 U.S.C.a. #2072, reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.